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1992]

CATECHISM OR IMAGINATION: IS JUSTICE SCALIA'S JUDICIAL STYLE TYPICALLY CATHOLIC?

DONALD L. BESCHLE*

I. INTRODUCTION

WHEN Clarence Thomas was nominated to the Supreme Court, much attention was paid to his early Roman Catholic education and upbringing.¹ Despite the ambiguous status of his current relationship with the church,² he was labelled as a Catholic nominee. This label was significant to some, perhaps none more so than Virginia Governor Douglas Wilder, who suggested that such a religious affiliation was problematic.³ The context of Governor Wilder's statement indicates specific concern with the effect of Thomas's religion on his attitudes towards abortion. Long before the emergence of the abortion issue, however, some have seen membership in the Catholic Church as reason to oppose, or at least be wary of, Supreme Court nominees.⁴

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1. Hundreds of articles have highlighted Justice Thomas' Catholic education. See, e.g., Seymour P. Lachman & Barry A. Kosmin, *Black Catholics Get Ahead*, N.Y. TIMES, Sept. 14, 1991, at 19; R.L. May, *Thomas' Religion Looms As Issue*, ATLANTA J. & CONST., July 21, 1991, at A1; Carolyn Pesce & Kimberly H. Taylor, *From Humble Roots, Path Leads to High Court*, USA TODAY, Oct. 16, 1991, at 2A. Probably never before has a Supreme Court nominee's elementary education been as much a subject of discussion as his legal education. For example, a nun who taught Justice Thomas testified on his behalf at the confirmation hearings. See Neil A. Lewis, *Thomas Is Unsuitable, Four Academics Say*, N.Y. TIMES, Sept. 18, 1991, at A16.

2. Justice Thomas currently attends services at an Episcopal church with evangelical leanings. See Laura Blumenfeld, *The Nominee's Soul Mate: Clarence Thomas's Wife Shares His Ideas*, WASH. POST, Sept. 10, 1991, at F1.

3. After provoking a flurry of criticism, Governor Wilder apologized for his impolitic remark. See B. Drummond Ayres Jr., *Virginia Leader Apologizes for Remark on Inquiry*, N.Y. TIMES, July 8, 1991, at A6; see, e.g., *There Is A Line and Wilder Stepped Over It*, ATLANTA J. & CONST., July 10, 1991, at A8; *They Have No Excuse for Anti-Catholic Bias*, NEWSDAY, July 22, 1991, at 34.

Not all commentators agreed that the religious question was inappropriate. See, e.g., Ellen Goodman, *Catholic Hierarchy, Not Liberals, Created Problem for Thomas*, CHI. TRIB., July 14, 1991, at C6 (asserting legitimacy of religious concerns because "bishops consistently tell Catholic officeholders how to vote" on abortion issue); Martin Schram, *When Religion, Sadly, Becomes an Issue*, NEWSDAY, July 11, 1991, at 92 (declaring that Catholic Church's recent pressures on Catholic officeholders to vote pro-choice makes religion legitimate concern).

4. See generally Sanford Levinson, *The Confrontation of Religious Faith and Civil*

(1329)

Aside from simple hostility toward those who are "different,"⁵ what gives rise to such opposition? Presumably, Catholicism must, in the views of some, be a useful tool to predict judicial performance. In its least sophisticated form, this is simply a matter of outcomes. If a nominee's church opposes legal abortion, the nominee is expected to do the same in his or her judicial role. A nominee's church seeks government funds to support its schools, therefore, the nominee is expected to uphold such aid against constitutional challenge. To many citizens, almost certainly including some lawyers (and perhaps Governor Wilder?) this is the source of the problem. But it is unlikely that this entirely explains it.

Catholicism was an issue long before obvious church-state issues emerged as a significant part of the Court's work.⁶ And, if Catholicism is merely a way of giving some insight into specific positions, why aren't other denominations regarded in the same way? One can hardly imagine the denominational affiliation of a Protestant nominee being thought significant; indeed, how many law professors, let alone citizens at large, could even identify the religious affiliations of the Court's non-Catholics?⁷ Catholicism must be seen by some as more than merely a predictor of a few discrete votes. Is it likely that it also predicts a distinctive way of judging which, apart from outcomes, might be cause for concern?

The crudest formulation of an affirmative response to this question would be the contention that Catholic judges, as well as other Catholics in government positions, are subservient to spe-

Religion: Catholics Becoming Justices, 39 DEPAUL L. REV. 1047 (1990) (examining implications of religious orientation on judicial interpretation of Constitution).

5. "[T]o be considered different can mean being stigmatized or penalized." *Id.* at 1053 (quoting Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1154 (1986)). For this reason, members of minority groups will often assert their essential "sameness" to the majority while simultaneously asserting the legitimacy of their "difference." *Id.* at 1052-53.

6. See generally John T. Noonan, *The Catholic Justices of the United States Supreme Court*, 67 CATH. HIST. REV. 369 (1981) (discussing impact of Catholicism on judicial appointments of five Catholic Justices); Barbara A. Perry, *The Life and Death of the "Catholic Seat" on the United States Supreme Court*, 6 J.L. & POL. 55 (1989) (discussing religion factor in confirmation of six Catholic Justices over past two centuries).

7. When they provided official biographies to a publication describing the federal judiciary, several of the Justices listed their religious affiliation. See THE AMERICAN BENCH: JUDGES OF THE NATION (Marie T. Hough et al. eds., 6th ed. 1991-1992). Chief Justice Rehnquist lists his religious affiliation as Lutheran, *id.* at 67; Justice Blackmun as Methodist, *id.* at 15; Justice O'Connor as Protestant, *id.* at 61; and Justice Souter as Episcopalian. *Id.* at 74. Justices White and Stevens give no information concerning religious affiliation.

cific instructions of religious leaders, particularly the Pope, in a way in which other believers are not.⁸ This notion of subservience to a "foreign prince" has a long history,⁹ was an explicit subject of discussion at least until 1960¹⁰ and still exists to some extent in popular opinion,¹¹ but is hardly likely to be given much credence by serious commentators today.

The next type of response might be that Catholicism makes it more likely that the judge will override positive law in furtherance of moral commands.¹² As Howard Vogel has pointed out, however, if this is a matter of concern, it poses the same dilemma when the nominee is one whose personal moral commitments may conflict with a commitment to support the Constitution,¹³ regardless of whether the commitment is based in Catholicism, another religious belief or a strongly held secular-based morality. Thus, while the role of a judge's personal moral commitments in his or her judicial work is a matter for serious debate, there would seem to be little reason to see it as a question which turns on denominational affiliation.

Apart from specific outcomes, apart from the nativist nonsense about Catholic judges "taking orders from the Pope," apart

8. See Levinson, *supra* note 4, at 1062-69 (discussing questions concerning role of Catholic Church's moral position in matters of public concern raised during confirmation hearings of Justices Brennan, Kennedy and Scalia).

9. *Id.* at 1067-69.

10. Thus, while mainstream editorial voices were critical of the use of religion as an issue in the debate over Justice Thomas, during the 1960 presidential campaign, John Kennedy found it necessary to publicly proclaim his independence from "outside religious pressures." See *id.* at 1055. For a discussion of the debate over Justice Thomas, see *supra* notes 1-3 and accompanying text.

11. Andrew Greeley has found that "a quarter of Americans believe that Catholics do not think for themselves and do whatever their leaders tell them." ANDREW M. GREELEY, *THE CATHOLIC MYTH: THE BEHAVIOR AND BELIEFS OF AMERICAN CATHOLICS* 3 n.1 (1990). During Justice Thomas' confirmation hearings, an advertising campaign in Washington, D.C. suggested that he would be subject to papal influence. See Laura S. Stepp, *Archdiocese Asks Metro to Pull Advertisements*, WASH. POST, Sept. 27, 1991, at C6 (discussing ads that appeared during confirmation hearings in Metrorail cars entitled "Who's Really Pulling the Strings?").

12. See Levinson, *supra* note 4, at 1069-80 (questioning how "the traditional Catholic emphasis on natural law and natural justice and the propensity to judge the commands of positive law against the purported claims of natural law" affects Catholic Supreme Court Justices).

13. See Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's "The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices"*, 39 DEPAUL L. REV. 1107, 1116 (1990) (stating that concern over religion of Catholic Justices can be extended to "all judicial nominees who hold personal moral commitments regardless of whether such commitments are religiously grounded or not").

from the clash between positive law and morality faced by any judge with personal moral commitments, is there any reason to think that there might be something distinctive about the way in which an American Catholic might approach the task of judging? George Kannar suggests that there might be in his recent comment on the jurisprudence of Justice Antonin Scalia.¹⁴

Kannar believes that Justice Scalia's commitment to textualism, and to the related principle of certainty of outcomes, can largely be traced to his Catholic upbringing.¹⁵ On the surface, of course, this conflicts with commonly accepted notions of what distinguishes Catholic from Protestant theology; Protestants, after all, emphasize religious texts, while Catholics are more attuned to tradition.¹⁶ But Kannar contends that such theory is less significant than "[t]he experience of growing up Catholic in pre-Vatican II America."¹⁷ It is this experience, exemplified by the *Baltimore Catechism*,¹⁸ which molded Justice Scalia, and presumably other Catholics, toward a more literalist "world of quaint legalisms."¹⁹

Is Justice Scalia's analytical style typically Catholic? Or, in fact, is it one which, while no doubt used by many Catholics, lawyers and non-lawyers, is less representative of Catholic than non-Catholic thought? Rather than attempting to address these questions by exploring a range of Catholic theological writing, this Article will proceed in a more empirical way. The subject, after all, is not normative; I do not propose to decide whether Justice Scalia, or anyone else, is an exemplar of "good" or "true" Catholic thought. Instead, I will take Justice Scalia and another Catholic jurist who might be seen as his antithesis, Justice Frank

14. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1300 (1990) (hypothesizing that as an American Catholic, Justice Scalia's attempt to reconcile "his personal moral views with his worldly participation" influences his constitutional perspective and adjudication).

15. *Id.* at 1309-20.

16. Thus, in theoretical terms, Kannar states that "if any of the Catholic Justices has adhered to a Thomist analytic construct in approaching moral issues, it is easier to make the case that his name is Brennan, not Scalia." *Id.* at 1312.

17. *Id.* at 1314. Kannar goes on to state that "a more fruitful route toward understanding Justice Scalia's jurisprudential world-view may lie not in 'High Church' theological discussions, but in the testimony of fellow pre-Vatican II American Catholics." *Id.* at 1313.

18. The *Baltimore Catechism*, a text presenting church doctrine in question and answer format, "remained the staple of the Catholic Sunday school and of children's religious instruction in general" until the 1960's. *Id.* at 1313 n.80 (quoting JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE* 391 (1985)).

19. *Id.* at 1314 (quoting GARRY WILLS, *BARE RUINED CHOIRS: DOUBT, PROPHECY, AND RADICAL RELIGION* 35 (1972)).

Murphy, and measure their styles against the empirical work done by Andrew Greeley and others in exploring the question of whether there is a distinctive Catholic style of thought. In the final analysis, it may be Justice Murphy, rather than Justice Scalia, who is more representative of what is distinctive about Catholic styles of thinking.

Does any of this matter, except perhaps to the devotee of Supreme Court history? I think it does. As long as people use religious affiliation as a predictor of likely judicial behavior, they should at least have some indication of what that affiliation is likely to indicate. Of course, not all co-religionists think alike; no one would contend that all Catholic judges will share Justice Murphy's analytical style. But, consciously or unconsciously, many may come to believe that Justice Scalia, currently America's most prominent Catholic jurist, provides the most likely model of a Catholic judicial style.²⁰ Testing the validity of this assumption is, therefore, a worthwhile endeavor.

II. TWO CATHOLIC JUSTICES

Anyone who proposes to explore the proposition that there is a distinctive style of thinking more likely to appear in the work of Catholics, and in particular Catholic judges, might immediately be discouraged from pursuing the notion by a brief examination of the lives and work of Justices Frank Murphy and Antonin Scalia. Aside from their Catholicism, one would be hard pressed to find two Supreme Court Justices who seem less similar.

A. *Justice Scalia*

Antonin Scalia was born in 1936 in Trenton, New Jersey, the son of Italian immigrants. His father was a professor of Romance languages; his mother, an elementary school teacher. His family moved to New York when he was a child. He attended St. Francis Xavier High School, in Manhattan, and Georgetown University, in Washington, D.C. At both schools he was at the top of his class. After his 1960 graduation from Harvard Law School, he spent

20. The tendency of the public to project the views of a particular Catholic on most other Catholics would not be a new phenomenon. Thus, it was widely believed during the 1950s that most Catholics, like Senator Joseph McCarthy, were hawkish anti-communists with less of a commitment to civil liberties than other Americans. Surveys indicate, however, that this view was incorrect. See ANDREW M. GREELEY, *THE AMERICAN CATHOLIC: A SOCIAL PORTRAIT* 90-111 (1977) (discussing surveys that indicate that "Catholics are at least as libertarian as Protestants").

eight years with a Cleveland law firm, taught at the University of Virginia, held a number of positions in the White House and Justice Department during the Nixon and Ford administrations, and returned to teaching in 1977 at the University of Chicago. By 1982, he had become a well known conservative academic voice, with special expertise in administrative law and regulatory issues.²¹ He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 1982, and to the Supreme Court in 1986.²²

When Justice Scalia was appointed, he was expected to be a strong conservative.²³ Many also thought that, largely based upon his personal gregariousness, he would be able to build a coherent conservative majority.²⁴ These predictions have proven only partially correct. For the most part, Justice Scalia's votes have favored positions endorsed by political conservatives, but he has not become a consensus builder; rather, he has become somewhat of a controversial figure even among conservatives.²⁵ This is due to his strong and sometimes personal attacks on what might be called the cautious conservative faction on the Court, most notably Justice Sandra Day O'Connor.²⁶ Almost invariably, this split is triggered by Justice Scalia's dogged insistence on following some principle to its extreme, while the more cautious conservatives prefer to temporize or leave for another day diffi-

21. James E. Wyszynski, Comment, *In Praise of Judicial Restraint: The Jurisprudence of Justice Antonin Scalia*, 1989 DET. C.L. REV. 117, 129-31 (discussing Justice Scalia's background and education).

22. For a discussion of Justice Scalia's work on the Court of Appeals for the D.C. Circuit, see Richard Nagareda, Note, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705 (1987).

23. For examples of typical assessments at the time of Justice Scalia's appointment, see Paul Marcotte, *New Kid on the Block*, 72 A.B.A. J., Aug. 1986, at 20 (commenting that "Scalia's conservative views on abortion, affirmative action, criminal procedure, and the limited role of the courts in setting public policy mirror those of the Reagan administration"); David O. Stewart, *What's Ahead with Rehnquist and Scalia?*, 72 A.B.A. J., Aug. 1986, at 36 (discussing Justice Scalia's views).

24. Typical was the comment of Professor Geoffrey Stone, a former colleague of Scalia at the University of Chicago: "He has the personal skills, intelligence, patience and manner to work out compromises and find common ground." Marcotte, *supra* note 23, at 20; see also Wyszynski, Comment, *supra* note 21, at 131 n.69 (opining that "Scalia was not a typical 'right-wing sourpuss,' but an ebullient, easy-going individual.").

25. See Linda Greenhouse, *Court's Consensus Marred By Infighting*, 135 CHI. DAILY L. BULL., July 28, 1989, at 1, 14 (noting that Justice O'Connor is "particularly perturbed by Justice Scalia's verbal slings"); Richard C. Reuben, *Scalia Is Still Taking Shots at O'Connor*, 104 L.A. DAILY J., May 21, 1991, at 7 (noting Scalia's "brutal judicial assaults" on Justice O'Connor).

26. See Greenhouse, *supra* note 25, at 1; Reuben, *supra* note 25, at 7.

cult issues unessential to the disposition of the case before the Court.²⁷

Whether one agrees or disagrees with him, one must concede that Justice Scalia has become a significant figure in contemporary jurisprudence. As a Justice with a relatively consistent approach to legal analysis, he has been the subject of much scholarly commentary,²⁸ but it is largely unnecessary to turn to the commentary except to elaborate on Justice Scalia's own explanation of his approach.²⁹ He has often stated that he sees clarity, precision and predictability as essential elements of the law.³⁰ While conceding the relevance of morality to law, he minimizes their interdependence: "Fortunately . . . the overwhelming majority of issues of public policy do not rise to the moral level."³¹ Where morality is relevant, it would seem to be so only for the voter, legislator and, perhaps, common-law judge. As an interpreter of statutes and constitutional provisions, Justice Scalia is a positivist.³²

As commentators have noted, Justice Scalia's commitment to textualism, clarity and predictability has been relatively consistent across different areas of substantive law, and in some instances, has led him to conclusions at odds with political conservatives.³³ Thus, he has been unwilling to extend the meaning of "confron-

27. See Linda Greenhouse, *Changed Path for Court? New Balance Held by 3 Cautious Justices*, N.Y. TIMES, June 26, 1992, at 1 (noting "hesitancy to overturn precedents" and "distaste for aggressive arguments" of Justices O'Connor, Kennedy and Souter); Linda Greenhouse, *Washington Talk: In Surprise, High Court Seems Less Solid*, N.Y. TIMES, May 31, 1992, at A18 (noting fragmentation and "underlying tension" within Court's conservative majority).

28. See, e.g., Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991).

29. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

30. See Scalia, *The Rule of Law as a Law of Rules*, *supra* note 29 (asserting that "rudimentary justice" requires predictability).

31. Scalia, *Morality, Pragmatism and the Legal Order*, *supra* note 29, at 123.

32. See Scalia, *The Rule of Law as a Law of Rules*, *supra* note 29, at 1187 (urging that "the Rule of law, the law of rules, be extended as far as the nature of the question allows"); see also Beau J. Brock, Comment, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623 (1991) (linking Scalia's theory of law to "modern American positivism").

33. See Kannar, *supra* note 14, at 1299 (discussing "cases in which the Justice has upset ordinary political expectations by reaching 'liberal' conclusions"); David Boling, Comment, *The Jurisprudential Approach of Justice Antonin Scalia: Methodology Over Results?* 44 ARK. L. REV. 1143 (1991) (discussing Justice Scalia's constitutional methodology).

tation" in the Sixth Amendment to permit steps to protect child witnesses from face-to-face encounters with criminal defendants.³⁴ He has insisted upon a sharp distinction between a "search" and the observation of an item in "plain view," rejecting the contention of law enforcement officials that lifting an item of audio equipment to check its serial number did not exceed the bounds of "plain view" observation.³⁵ Additionally, while not writing an opinion, he provided the deciding vote to strike down flag desecration statutes when, as Justice Kennedy pointed out, precedent quite clearly called for such an outcome.³⁶

More often, however, his distaste for "balancing" tests and preference for clear outcomes has led to the rejection of individual rights claims. Thus, the Eighth Amendment, in Justice Scalia's view, has little to say about prison guards arbitrarily beating prisoners; it speaks almost exclusively to the legitimacy of the "punishment" imposed by the state's sentence.³⁷ In the notoriously imprecise world of substantive due process, Justice Scalia strongly rejects overturning legislative judgments except in cases in which the government infringes on a specific right traditionally recognized by society;³⁸ in practice, this seems to draw a bright line which protects only traditional families engaged in traditional activities.³⁹ Justice Scalia has gone out of his way to belittle at-

34. See *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (stating that "[i]t is a truism that constitutional protections have costs").

35. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (noting that "[the] distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment").

36. See *Texas v. Johnson*, 491 U.S. 397, 415 (1989) (indicating that "nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it").

37. See *Hudson v. McMillian*, 112 S. Ct. 995, 1005 (1992) (Thomas, J., dissenting). Justice Scalia joined in Justice Thomas' dissent which, after noting that traditionally the amendment was not used to regulate prison administration, did allow an exception if the injuries inflicted were both "serious" and inflicted with a "culpable" state of mind. *Id.* at 1006. To Justices Thomas and Scalia, punches and kicks that loosened the inmate's teeth, cracked his partial dental plate and caused swelling of the face, mouth and lip did not reach that level. *Id.* at 1005.

38. Thus, in *Cruzan v. Director, Missouri Department of Health*, Justice Scalia addressing the right to die, stated that "the federal courts have no business in this field." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring). Furthermore, since 1989, Justice Scalia has explicitly called for the overruling of *Roe v. Wade*. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2873 (1992) (Scalia, J., concurring in part and dissenting in part); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in judgment).

39. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In *Michael H.*, Justice Scalia, writing for the Court, rejected the extension of due process familial rights

tempts, particularly by Justice O'Connor, to enunciate some middle ground in cases involving abortion and the asserted "right to die," which would rely on balancing interests to determine whether a state has imposed an "undue burden" on rights.⁴⁰

In various First Amendment contexts, Justice Scalia has continued to favor relative clarity over flexibility. Thus, in libel cases, an assertion of fact will not lose that status by appearing in a context which, in its "totality," might be seen as an expression of opinion.⁴¹ The Free Exercise Clause protects only what is unambiguously religious: belief, prayer and proselytization. It gives no special protection to activity such as the ingestion of peyote, which might or might not, in individual cases, be a manifestation of religious beliefs.⁴²

Apart from the analysis of individual rights claims, Justice Scalia has also championed clear lines and strong textualism in matters of separation of powers and statutory interpretation. For example, when text and history indicate that initiating criminal prosecutions is an executive function, then that function must be exercised only by officials who are fully responsible to executive authority, even if the target of the investigation is an executive officer.⁴³ Arguments that this conclusion undermines the general purpose of separation of powers, which is to prevent unreasonable accumulations of power in any branch of government, although persuasive to all other members of the Court, do not sway Justice Scalia.⁴⁴ He also has become the leading advocate

to a father of a child conceived during an adulterous affair. *Id.* at 124. Constitutional protection should turn on whether the relationship "has been treated as a protected family unit under the historic practices of our society." *Id.*

40. See *Casey*, 112 S. Ct. at 2873-85 (Scalia, J., concurring in part and dissenting in part); *Cruzan*, 497 U.S. at 292-301 (Scalia, J., concurring); *Webster*, 492 U.S. at 532-37 (Scalia, J., concurring in part and concurring in the judgment).

41. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) (noting that "expressions of 'opinion' may often imply an assertion of objective fact"). In *Milkovich*, Justice Scalia joined in the majority opinion written by Justice Rehnquist. *Id.* at 2.

42. *Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, Justice Scalia, writing for the Court, rejected the need for any free exercise balancing test when a statute did not "compel affirmation of religious belief, punish the expression of religious doctrines, impose special disabilities on the basis of religious views, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* at 877 (citations omitted).

43. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Justice Scalia was the only member of the Court to maintain that the office of a special prosecutor, not fully subordinate to executive officers, could not be created to carry out the "purely executive power" of prosecuting members of the executive branch. *Id.*

44. For a concise statement of the arguments in favor of the special prose-

for minimizing the role of legislative history, with all of its potential ambiguity, in the process of statutory interpretation. Although recourse to legislative history might sometimes be necessary, the favored set of tools for statutory interpretation should be limited to the text and a dictionary.⁴⁵

Thus, outcomes aside, we have an unusually coherent example of judicial philosophy and style. Justice Scalia is a judicial positivist. Judges, he believes, should not be in the business of making policy decisions; rather, they interpret. Perhaps the most important obligations of the interpreter are clarity and precision; the greatest pitfall is ambiguity. Surely, Professor Kannar's characterization of Justice Scalia's work as reflecting "a profoundly dichotomous world view"⁴⁶ seems essentially correct. If the goal is to be clear, then the means must be likewise, leading to "a tendency toward analytic rigidity and a limited tolerance for ad hoc policy-making."⁴⁷

For the most part, even those who strongly disagree with Justice Scalia express admiration for his intellect, his powers of reasoning and expression and his consistency.⁴⁸ In this regard, as well as many others, we will find sharp contrasts when we compare this profile of contemporary America's most prominent

cutor law, based on the contention that the primary evil to be guarded against by separation of powers was excessive concentration of government power in any one branch of government, see Eric R. Glitzenstein & Alan B. Morrison, *The Supreme Court's Decision in Morrison v. Olson: A Common Sense Application of the Constitution to a Practical Problem*, 38 AM. U. L. REV. 359 (1989).

45. For a discussion of Justice Scalia's approach to statutory interpretation, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (noting that Justice Scalia considers legislative history irrelevant to determination of plain meaning of statute); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160 (stating that Justice Scalia applies "textualist" approach to statutes; "originalist" approach to Constitution).

46. Kannar, *supra* note 14, at 1323.

47. *Id.* at 1339.

48. A good example of this can be seen in the comments of Professor Geoffrey Stone. See Marcotte, *supra* note 23, at 20. Gerald Gunther has described Justice Scalia as "bright as hell" and Alan Dershowitz has paid him the back-handed compliment of being "[one] of the finest 19th-century minds in America." Jean M. Meaux, Comment, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225, 228 n.20, 229 n.27 (1987). Those ideologically closer to Justice Scalia, of course, are even less restrained. Judge Alex Kozinski likens Justice Scalia to Justices Holmes, Brandeis and Harlan, and predicts that Justice Scalia "will take his place among the Court's giants." Alex Kozinski, *My Pizza With Nino*, 12 CARDOZO L. REV. 1583, 1591 (1991). A recent NEXIS search of newspaper articles containing the words "Scalia" and "brilliant" turned up 119 citations. Search of NEXIS (August 1992).

Catholic jurist with one of the half-dozen Catholics who preceded him on the Court.

B. *Justice Murphy*

Frank Murphy was born in 1890, in Harbor Beach, Michigan. His father was a lawyer, an active Democrat in a predominantly Republican community, and an ardent advocate of Irish national causes.⁴⁹ His mother, also Irish-American, is credited with instilling a deep religious piety in her son, who was formally educated in public schools.⁵⁰ Murphy received a B.A. and an L.L.B. from the University of Michigan, and after military service in World War I and a brief period of advanced legal studies in London and Dublin, he became an Assistant United States Attorney in Detroit.⁵¹

In 1923, he was elected judge of the Recorder's Court, a Detroit criminal court. He quickly developed a reputation as a progressive trial judge, using the findings of sociologists and psychiatrists to assist him in sentencing decisions, and gaining widespread praise for his work in presiding over a racially charged murder trial in which a black physician, who had killed a member of a white mob attacking his house, was acquitted.⁵² He was elected Mayor of Detroit in 1930, and became a strong advocate of federal assistance to cities to relieve the pain caused by the Depression.⁵³

A strong supporter of Franklin Roosevelt, Murphy was appointed Governor General of the Philippines in 1933, where he saw his task as moving the islands toward self-rule. In 1936, at the urging of President Roosevelt, Murphy resigned to run for Governor of Michigan, and he was elected.⁵⁴ He was immediately faced with the need to deal with a wave of sit-down strikes against

49. Albon P. Man, *Mr. Justice Murphy and the Supreme Court*, 36 VA. L. REV. 889, 891 (1950). The definitive biography of Justice Murphy is the three-volume work of Sidney Fine. See SIDNEY FINE, *FRANK MURPHY: THE DETROIT YEARS* (1975); SIDNEY FINE, *FRANK MURPHY: THE NEW DEAL YEARS* (1979); SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS* (1989).

50. Man, *supra* note 49, at 891-92.

51. *Id.* at 892-93.

52. *Id.* at 893-94. The defense of Dr. Ossian Sweet and his relatives was undertaken by Clarence Darrow in what was to be his last high-profile case before retiring from active legal practice. See James W. McElhaney, *The Trial of Henry Sweet*, 78 A.B.A. J., July 1992, at 73.

53. See Thurman W. Arnold, Comment, *Mr. Justice Murphy*, 63 HARV. L. REV. 289, 290 (1949) (stating that "Murphy determined that no one in Detroit should starve because of lack of employment").

54. See Man, *supra* note 49, at 895-900.

General Motors. General Motors had obtained court orders to forcibly eject and arrest the workers, but Governor Murphy refused to dispatch the National Guard to enforce the order, insisting instead that the company and the United Auto Workers engage in weeks of intense negotiations, which ended in a peaceful settlement.⁵⁵

Although praised by many for avoiding bloodshed, Governor Murphy was widely condemned by the business community for not using force to end the strikes. The polarization of attitudes toward him can be seen in that even after his defeat for re-election in 1938, largely attributable to his pro-labor record, he was still seriously discussed as a possible Democratic candidate for President, should President Roosevelt step down in 1940.⁵⁶ Immediately after his defeat for re-election, Murphy was appointed United States Attorney General. In little over a year in that post, he launched anti-corruption prosecutions, strongly supported the antitrust policies of Assistant Attorney General Thurman Arnold, and, perhaps most significantly, established the Civil Rights Section of the Department of Justice.⁵⁷ His speeches and writings from this period stressed the need for government to respect First Amendment rights and to fight discrimination against minority groups.⁵⁸

Following the death of Justice Pierce Butler (the Court's only Catholic member at that time), Murphy was appointed to the Supreme Court and confirmed by the Senate in January 1940.⁵⁹ He served until his death in 1949 at the relatively young age of

55. *Id.* In Thurman Arnold's words: "Governor Murphy was unable to see the situation in the clear black and white of the law of trespass." See Arnold, *supra* note 53, at 291.

56. See Man, *supra* note 49, at 900; see also Eugene Gressman, *The Controversial Image of Mr. Justice Murphy*, 47 GEO. L.J. 631, 632 & n.2 (1959) (noting that James Farley believed that Justice Murphy was one of President Roosevelt's three top choices to succeed him as President).

57. See Man, *supra* note 49, at 901-07; see also Thurgood Marshall, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745, 746 (1950) (praising Justice Murphy's dedication to American civil rights and opposition to "discriminatory governmental action").

58. For excerpts from his speeches as Attorney General, see MR. JUSTICE MURPHY AND THE BILL OF RIGHTS 61-76 (H. Norris ed., 1965).

59. Man, *supra* note 49, at 907. Those who long for an antidote to today's detailed and public confirmation process for Supreme Court nominees might take a look at the only existing records of the Senate Judiciary Committee hearings on Justice Murphy, which consist of six handwritten pages. See THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1975 (Roy M. Mersky & J. Myron Jacobstein eds. 1975).

59.⁶⁰ Not surprisingly, in light of his pre-court career, he staked out a position as the most consistent civil libertarian among the Justices.⁶¹ Some of his most prominent positions, often taken in dissent, have become well accepted, yet at the time were considered at best innovative, at worst radical. For example, Justice Murphy dissented from the Court's refusal to hold that the Constitution required a state to appoint counsel to an indigent accused of a non-capital felony,⁶² and from the Court's refusal to apply the exclusionary rule to the states.⁶³ Over a decade later, both positions would be adopted by the Court,⁶⁴ as would Justice Murphy's dissenting view that the Fifth Amendment prevents a state from allowing a jury to draw negative inferences from a criminal defendant's refusal to testify.⁶⁵

Justice Murphy, who did not live to see *Brown v. Board of Education*,⁶⁶ rejected narrow interpretations of statutes and concepts such as "state action" as barriers to justify "the slightest refusal . . . to expose and condemn [racism] whenever it appears."⁶⁷ His strong support of equal protection rights led him not only to sup-

60. Man, *supra* note 49, at 913.

61. A tabulation of divided cases involving civil liberties claims during Justice Murphy's last three years on the Court shows that he voted in support of the claimed right 53 times, against it three times. John P. Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L.J. 1, 24 (1949). His consistent ally Justice Wiley Rutledge voted in favor of the right claimed 52 times, against four times. *Id.* Justice Douglas voted for 47 and against 10 such claimed rights; Justice Black for 39 and against 17. *Id.* All of the other Justices supported significantly less than half of these claims. *Id.*

62. *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting), *overruled* by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

63. *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting), *overruled* by *Mapp v. Ohio*, 367 U.S. 643 (1961).

64. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts*); *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf*).

65. *Adamson v. California*, 332 U.S. 46, 123 (1947) (Murphy, J., dissenting), *overruled* by *Malloy v. Hogan*, 378 U.S. 1 (1964). A further example of Justice Murphy's foresight in criminal procedure was his dissent in a case refusing to extend Fourth Amendment protection to wiretapping. *See Goldman v. United States*, 316 U.S. 129 (1942) (Murphy, J., dissenting), *overruled* by *Katz v. United States*, 389 U.S. 347 (1967).

66. 347 U.S. 483 (1954). One commentator noted that "Murphy was prepared as early as . . . 1948 . . . to declare 'separate-but-equal' educational facilities unconstitutional." Michael E. Parrish, Book Review, 2 CONST. COMM. 463, 468 (1985) (reviewing SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS (1984)).

67. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring); *see also Screws v. United States*, 325 U.S. 91, 138 (1945) (Murphy, J., dissenting) (stating that "those entrusted with authority shall [not] be allowed to violate with impunity the clear constitutional rights of the inarticulate and the friendless").

port claims by blacks, but perhaps even more strikingly, to strongly defend the rights of Japanese-Americans during World War II.⁶⁸ His dissent in *Korematsu v. United States* has not only been largely vindicated by history,⁶⁹ but seems even more admirable in light of Justice Murphy's high regard for President Roosevelt and the United States military in general, not to mention his strong support of the war effort.⁷⁰

On First Amendment issues, Justice Murphy was as strongly libertarian, but less likely to be relegated to the role of dissenter. His first significant opinion for the Court, *Thornhill v. Alabama*, established that the act of picketing was entitled to First Amendment protection, rejecting a narrow reading of the constitutional term "speech."⁷¹ This decision would have significant impact on later free speech jurisprudence.⁷² His advocacy of using a strong version of the "clear and present danger" test⁷³ foreshadowed

68. After his hesitant concurrence in *Hirabayashi v. United States*, which upheld curfew restrictions on Japanese-Americans living on the Pacific Coast in early 1942, Justice Murphy wrote a strong dissent in *Korematsu v. United States*, the now largely discredited case in which the removal of Japanese-Americans to internment camps was upheld. See *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting); *Hirabayashi v. United States*, 320 U.S. 81, 109 (1943) (Murphy, J., concurring); see also *Ex parte Endo*, 323 U.S. 283, 307 (1944) (Murphy, J., concurring) (stating that "detention in Relocation Centers of persons of Japanese ancestry . . . is another example of the unconstitutional resort to racism inherent in the entire evacuation program").

69. In 1988, Congress enacted an apology to Japanese-Americans for the "evacuation, relocation and internment" enforced during World War II, and provided for restitution payments. See 50 U.S.C. § 1989 (1988).

70. Justice Murphy sought commission as a combat officer in World War II; his request was denied because of age. Man, *supra* note 49, at 908. Nevertheless, he took time during the summer of 1942 to receive three months of military training. *Id.* He told the New York Times: "The Army is all right . . . I know, I have seen it myself." *Id.* at 909. Further, "he insisted on wearing a military uniform to the Court when the Justices met in Special Term to hear the pleas of the Nazi saboteurs." Parrish, *supra* note 66, at 468. Nevertheless, he strongly dissented from the Court's approval of the trial of General Yamashita for war crimes by an American military tribunal after the war. *In re Yamashita*, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting) (arguing that Fifth Amendment due process protection extended to those accused of war crimes, even enemy belligerents); see also *Hartzel v. United States*, 322 U.S. 680 (1944) (Murphy, J.) (holding that evidence of intent was insufficient to find defendant in violation of Espionage Act of 1917, despite anti-war activities).

71. *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940).

72. The acceptance of picketing as entitled to First Amendment protection despite the fact that it contains elements of conduct paved the way for other First Amendment cases. See *Spence v. Washington*, 418 U.S. 405 (1974) (displaying altered version of U.S. flag is protected expression); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing armbands is act entitled to First Amendment protection).

73. See *Bridges v. Wixon*, 326 U.S. 135, 157 (1945) (Murphy, J., concurring) (denying deportation of individual because former affiliation with organization

Brandenburg v. Ohio,⁷⁴ and surely indicates that he would have dissented in the now largely discredited 1951 *Dennis v. United States*⁷⁵ case.

In several opinions, Justice Murphy clearly indicated that he believed that there is independent force to the Free Exercise Clause beyond the protection the remainder of the First Amendment provided to other speech.⁷⁶ While the Court endorsed this position in the 1960s, the 1990 case of *Department of Human Resources v. Smith*,⁷⁷ severely undercut it. Interestingly enough, Justice Scalia wrote the *Smith* opinion. Justice Scalia's narrowing of Free Exercise protection has been widely criticized, not merely by liberal commentators, but also by some commentators generally regarded as conservative.⁷⁸

Because Justice Murphy's views have been vindicated so often, one might expect that he would be held in high regard, as a "great dissenter" in the mold of Justices Holmes and the first Justice Harlan.⁷⁹ It is at least somewhat surprising that, unlike Jus-

advocating overthrow of U.S. government did not represent clear and present danger to public welfare); *Hartzel*, 322 U.S. at 687 (holding that clear and present danger "that the activities in question will bring about the substantive evils" Congress sought to prevent is necessary element of Espionage Act violation).

74. 395 U.S. 444 (1969) (holding that Ohio law prohibiting advocacy of forceful or illegal acts violated First and Fourteenth Amendments because advocacy did not necessarily produce imminent lawless action).

75. 341 U.S. 494 (1951) (permitting prosecution of speech as crime even when evil consequences are remote, if those consequences (overthrow of government) are sufficiently serious).

76. See *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (Murphy, J., dissenting) (arguing for exempting minors distributing religious literature from child labor law); *Jones v. City of Opelika*, 316 U.S. 584, 611-12 (1942) (Murphy, J., dissenting) (advocating exempting religious materials from general revenue tax on sale of literature), *vacated*, 319 U.S. 103 (1943). In *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), Justice Murphy joined the majority in striking down the practice of elective "release time" religious instruction in public schools as a violation of the Establishment Clause. *Id.* at 210-11. This vote brought him severe criticism from Catholic church leaders. See Man, *supra* note 49, at 927-29.

77. 494 U.S. 872 (1990) (holding that Free Exercise Clause did not prohibit application of state drug laws to sacramental use of peyote).

78. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1420 (1990) (commenting that "[t]he historical record casts doubt on [the *Smith*] interpretation of the free exercise clause").

79. Research by David Danelski indicates that of all the Justices of his era, Justice Murphy was the one most likely to have cases in which he dissented ultimately overruled. This was not merely a function of an unusually high total number of dissenting votes; Justices Douglas, Black and Frankfurter each dissented more often than Justice Murphy from 1940 to 1949. Daniel J. Danelski, *The Riddle of Frank Murphy's Personality and Jurisprudence*, 13 LAW & SOC. INQUIRY 189, 198 & n.51 (1988).

tice Scalia, Justice Murphy was, and to some extent still is, regarded as a judicial lightweight—at best a utopian who somehow stumbled onto correct outcomes, at worst “a New Deal political hack,”⁸⁰ totally result oriented and unable to treat “the cases presented as complex problems.”⁸¹ Yet, in numerous unheralded cases dealing with such matters as tax law, Justice Murphy displayed at least an average level of technical proficiency.⁸² Surely the analytical style in his best-remembered opinions was consciously adopted, and not merely the result of an inability to comprehend alternatives.

How can Justice Murphy's philosophy and style of thought be summarized? One might begin by simply constructing the antithesis to Justice Scalia's style and philosophy. Justice Murphy worked with sympathy toward the natural law belief that “God had endowed men with reason so that they could make their temporal law . . . conform to natural right. . . . Justice Murphy believed that the Court's duty was to build a system of law that both men and government could follow with good conscience.”⁸³ This task could not be effectively undertaken through “complex dialectic,” but rather through a commitment to fundamental values that would override the value of technical precision.

Consider Justice Murphy's comments on statutory interpretation in a labor law case: “Such an issue can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exer-

80. John P. Roche, *The Utopian Pilgrimage of Mr. Justice Murphy*, 10 VAND. L. REV. 369 (1957). The lightweight label given to Justice Murphy summarized “a word-of-mouth tradition in law school circles that the Justice was a legal illiterate.” *Id.*

81. Philip B. Kurland, Book Review, 22 U. CHI. L. REV. 297, 299 (1954); see also Woodford Howard, *Justice Murphy: The Freshman Years*, 18 VAND. L. REV. 473, 473-74 (1965) (“[T]he Justice commonly has been pictured by his critics as a man who followed militantly liberal predilections without faltering—and without thought—from his first day on the Court to his last.”). In sharp contrast to Justice Scalia, whose intellect is often praised even by his opponents, even friendly comment about Justice Murphy has tended to be patronizing. See John P. Frank, *Justice Murphy: The Goals Attempted*, 59 YALE L.J. 1, 1 (1949) (commenting that “[Justice] Murphy seemed to reach fairly happy results even though he lacked proper concern for legal techniques”). Of course, there were and are some exceptions, such as the remarks of Thurgood Marshall and Thurman Arnold. For Justice Marshall's remarks, see *supra* note 57. For Thurman Arnold's comments, see *supra* note 53.

82. See Frank, *supra* note 81, at 3-4 & nn.15-16.

83. Arnold, Comment, *supra* note 53, at 289.

tion.”⁸⁴ Justice Roberts’ response might be mistaken for a Scalia pronouncement:

The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with the desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.⁸⁵

Consider also Justice Murphy’s statement: “The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.”⁸⁶

Such a philosophy is, of course, highly unlikely to produce an abundance of clarity, and it might be criticized on those grounds. Chief Justice Stone reluctantly assigned opinions to Justice Murphy, at one point stating that: “The job of the Court . . . is to resolve doubts, not create them.”⁸⁷ How then can the value that Justice Murphy placed ahead of clarity and formalism be described? Eugene Gressman, a former law clerk to Justice Murphy, characterized it as “judicial empathy,”⁸⁸ the ability to be sensitive to the views and feelings of disparate types of people, “to understand and accommodate competing interests”⁸⁹ and to frame a legal world more inclusive of the haphazard diversity of the American people. Gressman invokes Jerome Frank: “[A]ble judges cannot live by rules alone . . . a judge who knows nothing but the rules will be . . . a dispenser of injustice, since . . . the art of judging really lies in the ability to cope with the unruly.”⁹⁰ Gressman further cites Frank for the proposition that a judge should have

84. *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590, 592 (1944).

85. *Id.* at 606 (Roberts, J., dissenting).

86. *Falbo v. United States*, 320 U.S. 549, 561 (1944) (Murphy, J., dissenting).

87. Roche, *supra* note 80, at 370 (quoting ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 793 (1956)).

88. Gressman, *supra* note 56, at 637.

89. *Id.* at 643.

90. *Id.* at 647 n.42 (citing Jerome Frank, Book Review, 61 YALE L.J. 1108, 1113 (1952)).

a poetic imagination, a sensitive awareness of the individual human beings involved in law suits [sic], and an eagerness that their unique sayings and doings shall not be ignored. His interest is in having justice done in each case, not in contriving a neat system of rules to satisfy the lazy or those with such callow sensibilities that only smooth-flowing harmonies satisfy them.⁹¹

To create a hypothetical jurist to set in contrast to Justice Scalia, a better model than Justice Murphy could hardly be found. Justice Murphy was as much a hero to liberals as Justice Scalia is to conservatives. Justice Murphy's rejection of formalism and predictability as paramount values, his empathy, inclusiveness and "poetic imagination" stand in contrast to Justice Scalia's positivism, commitment to precision and "profoundly dichotomous" style. Yet each was a pre-Vatican II Catholic and, by all accounts, each grew to regard religion as an important part of his life.⁹² Is one of their styles more typically Catholic than the other? Or can it be concluded that there is simply no style of thinking more typically Catholic than others?

III. IS THERE A DISTINCTIVELY CATHOLIC STYLE OF THOUGHT?

Observers of the lives of Justice Murphy and Justice Scalia agree that for both men, Catholicism was a significant part of their lives, and not merely a nominal affiliation.⁹³ If this can be true of two Justices so otherwise different, one might be led to discount the connection between religious commitment and jurisprudence. Yet it seems strange that strongly held beliefs about ultimate values would not influence a Justice's work. Commentators have viewed Justice Murphy's jurisprudence as largely based

91. Gressman, *supra* note 56, at 638 (citing Jerome Frank, Book Review, 61 YALE L.J. 1108, 1112 (1952)).

92. Justice Murphy "took his religious duties seriously" and is said "to have spent at least an hour [a day] reading the . . . Bible." Man, *supra* note 49, at 892. Justice Scalia has commented on the continuing effect of Catholicism on his life. See Kannar, *supra* note 14, at 1318-19.

93. For a discussion of the significance of Catholicism in the lives of Justices Murphy and Scalia, see *supra* note 92 and accompanying text. Occasionally, distinctly Catholic references appeared in both Justices' opinions. For an example, see Justice Scalia's reference to St. Jude in *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring). Perhaps more interesting, because it is less obviously self-conscious, is Justice Murphy's characterization of deportation as "being excommunicated." *Bridges v. Wixson*, 326 U.S. 135, 159 (1945) (Murphy, J., concurring).

in Catholic thought.⁹⁴ Yet Professor Kannar views Justice Scalia's very different approach as grounded in his Catholic education.⁹⁵

Kannar's explanation for the apparent contradiction is that a difference exists between the most sophisticated levels of a church's theology and the ways those teachings are presented to, and understood by, the typical church member.⁹⁶ Thus, while the Catholic theologian may appreciate, say, Aquinas' argument for the ultimate primacy of individual conscience, the average church member is likely to believe that the magisterium is simply to be obeyed.⁹⁷ While the theologian or church historian understands that the primacy of texts is more closely associated with Protestant than Catholic thought, the normal Catholic layperson, particularly those educated before the reforms of the Second Vatican Council, is likely to think that unambiguous answers are found in texts, and not merely the Bible itself, but such manuals as that classic tool of American Catholic education, the *Baltimore Catechism*.⁹⁸

The notion is intriguing—perhaps examining the way actual Catholic lay people think might be more fruitful than examining the work of theologians. However, Professor Kannar provides only anecdotal evidence that Justice Scalia's rigorous adherence to text and “profoundly dichotomous world view” are, in fact,

94. See James A. Jolly, *The Social Philosophy of Frank Murphy*, 42 U. DET. L.J. 585, 586 (1965) (stating that “Catholicism instilled convictions that there was a moral basis to social relationships, that faith of itself was insufficient unless accompanied by works, and that crass, rugged individualism and a greedy pursuit of profit are improper”); Roche, *supra* note 80, at 377 (stating that “Murphy's anti-traditionalism thus itself stemmed from a tradition traceable through St. Thomas Aquinas to Aristotle”). Focusing only on specific outcomes, specifically Justice Murphy's vote in *McColum v. Board of Education*, however, leads to the same conclusion formed by John Frank: “We may deduce that the principles guiding his decisions were quite apart from his Catholicism.” Frank, *supra* note 81, at 3; see also *McColum v. Board of Educ.*, 333 U.S. 203 (1948).

95. Kannar, *supra* note 14, at 1313-14.

96. *Id.* Kannar does stress that he does not mean “to account for the views of all Catholics.” *Id.* at 1313 n.83. The discussion does proceed, however, as if the legalistic, literalistic view is to be regarded as the norm, and cases such as Justice Brennan are to be regarded as the exception. *Id.* at 1313-14 & n.83. Kannar uses the example of Robert Kennedy, beginning his public career as “self-righteously harsh,” but evolving over time. *Id.* at 1313 n.83. The implication is that Kennedy and others moved somehow away from typical Catholic thought; in Kennedy's case “to Greek tragedians and Albert Camus.” *Id.*

97. *Id.* at 1313 & n.80.

98. *Id.*; see also JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE* 441 (1985) (stating that “the clarity and precision of the Baltimore Catechism era has given way to less precise, popular expressions of theological truths”). For a further discussion of the *Baltimore Catechism*, see *supra* note 18.

more typical of actual Catholic thought than alternative styles.⁹⁹ Recently, a body of data has been developed, primarily by Andrew Greeley, concerning the differences between Catholics and Protestants in the ways in which they view the world. The data addresses the consequences of these differences in attitudes toward social problems and other questions. This data seemingly refutes the notion that Justice Scalia's jurisprudential style is typically Catholic; if anything, it points to Justice Murphy as the more representative model. Although the primary concern here is with empirical evidence, it will be helpful to briefly discuss theologian David Tracy's theoretical work, which provides much of the background for Greeley's empirical study.¹⁰⁰

A. *The Theory: David Tracy and the "Analogical Imagination"*

It is common to regard doctrine, creedal statements or rules as the core of religion. Yet many students of religion have concluded that these, however important, are derived from the true core. That core is the experience of an ultimate reality and the perceived need to understand and communicate it.¹⁰¹ The process of translation from experience to communication will require "imagination," that is, the power to create images, symbols and stories. The listener, accepting those stories or images as making sense in light of his or her own experience, now has a framework for understanding reality.¹⁰²

The fundamental Christian experience, of course, is the Incarnation, the experience by the first Christian community of Christ himself. That experience is intensely paradoxical. God is present in the world, but at the same time beyond it. God affirms the goodness of creation, but at the same time insists on its im-

99. Kannar quotes Garry Wills, William F. Buckley, Mario Cuomo and Mary McCarthy to establish "a specifically Catholic tendency to attach a special importance to words." Kannar, *supra* note 14, at 1315. However distinguished, the reminiscences of a few people do not comprise a valid sample of a population.

100. DAVID TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* (1986). Greeley discusses how Tracy's work, and that of anthropologist Clifford Geertz, helped to provide the theoretical underpinnings for his empirical research. GREELEY, *supra* note 11, at 34-36.

101. TRACY, *supra* note 100, at 405-07; *see also* GREELEY, *supra* note 11, at 39. Greeley states that "[r]eligion, both in the life of the individual and in the great historical traditions, was then experience, symbol, story . . . and community before it became creed, rite, and institution. The latter were essential, but derivative." *Id.*

102. Thus, Greeley summarizes and paraphrases Geertz: "[R]eligion is a set of symbols that provide explanation for the ultimate problems of life and templates for responding to those problems." GREELEY, *supra* note 11, at 36.

perfection.¹⁰³ This relationship of God and the world, what Tracy calls “real-similarities-in-real-difference,”¹⁰⁴ or “not yet, yet even now,”¹⁰⁵ will inevitably lead those attempting to translate the experience to two different types of emphases and two different “conceptual languages.”

Analogy, the first “language” or “imagination,” will usually emphasize similarities; that is, the ways God is manifest in the world.¹⁰⁶ While negations of the world will remain essential to preventing this concept from degenerating into the “merely affirmative,”¹⁰⁷ an analogical theology “will ordinarily focus upon the religious experience of trust, wonder, giftedness” and on “the possible order and . . . emerging harmony” in the variety of creation.¹⁰⁸ When done well, this analogical theology produces a rich, but rather untidy, interpretation of reality:

[T]he likenesses discovered in variety, the emerging harmony discovered in order are produced by the presence of those moments of intensity, the necessary negations: similarity-in-difference, the negation of any univocity, the manifestation of the event in sheer giftedness, the concealment in every disclosure, the absence in every presence, the incomprehensibility in every moment of genuine comprehensibility, the radical mystery empowering all intelligibility.¹⁰⁹

The second theological language is the dialectical. This language focuses on the “real differences,” the “not yet.” It is significantly more skeptical of the world, wary of any “poisonous dreams of establishing any easy continuities between Christianity and culture” and insistent on fidelity to “the Word of Jesus Christ: a word disclosing the reality of the infinite, qualitative distinction between that God and this flawed, guilty, sinful, presumptuous, self-justifying self.”¹¹⁰ Thus, the clarity of the Word, and the firmness of its negation of the world, stand in contrast to the analogical imagination.

103. TRACY, *supra* note 100, at 407-34. As Tracy notes, “the event of Jesus Christ” presents the fundamental paradox of a God who is “personlike yet transpersonal,” present yet hidden. *Id.* at 430-31.

104. *Id.* at 409.

105. *Id.* at 431.

106. *Id.* at 408.

107. *Id.* at 409.

108. *Id.* at 413.

109. *Id.*

110. *Id.* at 415.

It is immediately obvious that the description of the analogical imagination is closer to the classic image of Catholic thought, and that the dialectical imagination is closer to Protestant thought. But is this distinction borne out today in the actual experience of the Catholic and Protestant communities? Surely, there is reason to think that it might not be. After all, contemporary Protestantism includes not only the legacy of Barth, but also the liberal Protestantism of the last century.¹¹¹ Furthermore, as Tracy himself points out, Catholic theology has seen the richness of analogy "yield[] in the neo-Scholastic manuals to the clear and distinct, the all-too-ordered and certain, the deadening, undisclosive and untransformative world . . . of a manualist Thomism committed to certitude, not understanding, veering toward univocity, not unity-in-difference."¹¹²

Thus, the question whether a distinction remains between Catholic and Protestant thought still exists. Accepting the existence of two sharply different styles of religious imagination, and accepting the likelihood that such styles likely spill over into styles of jurisprudence, is there any reason to believe that either style of thought is more typical among twentieth century American Catholics? Specifically, if Justice Scalia is largely a product of the "neo-Scholastic manuals" to which Tracy refers, is his style of thought empirically typical of Catholics?

B. *The Data: Andrew Greeley's Work on the Catholic Religious Imagination*

Tracy's description of the analogical and dialectical imagination provides the background for the empirical work of Andrew Greeley.¹¹³ In actuality, is the analogical imagination reflected in the classics of Catholic theology more likely present in twentieth century Catholics than in other denominations? Or, as many would suspect, has secularization led to homogenization, so that these styles of thought are no longer more likely to be reflected in one or another denomination? Or can we go even further, and assert that contemporary Catholics are disproportionately dialectical "manualist[s] . . . committed to certitude, not understanding,

111. Thus, the analogical imagination is present "in all the major Liberal and 'post-liberal' Protestant theologies from Schleiermacher to contemporary process theologies," as well as "early twentieth-century Catholic modernists and their successors." *Id.* at 412.

112. *Id.* at 413 (footnote omitted).

113. For a further discussion of the background for Greeley's research, see *supra* note 11.

veering towards univocity, not unity-in-difference"?¹¹⁴

After surveying respondents in the United States and six other countries, Greeley concluded that "Catholics are more likely than Protestants to see God as an intimate other—lover, friend, spouse and mother—and the world and human nature as basically good" than are Protestants.¹¹⁵ When asked to describe God as either father or mother, as either king or friend, large majorities of both Catholics and Protestants opted for father and king, which is unsurprising in light of traditional Christian theology. More Catholics than Protestants, however, described God as mother and friend.¹¹⁶ The difference was statistically insignificant among respondents age forty and over, but twenty-seven percent of Catholics under age forty, as opposed to nineteen percent of Protestants under age forty, chose the warmer "mother and friend" image.¹¹⁷

How does this warmer image of God, and more accepting image of the world and human nature, correlate with styles of thought concerning moral, social and legal questions? A number of Greeley's findings stand out as particularly interesting in terms of their relevance to judicial decision-making. Consistently, these findings suggest that rigidity, literalism and intolerance of ambiguity are less likely to be a Catholic approach to moral, social and legal issues than a Protestant approach to these same issues. Specifically, in all countries surveyed, Catholics were more likely than Protestants to value "equality" over "freedom" and "fairness" over "individualism."¹¹⁸ Somewhat paradoxically, while Catholics were more likely than Protestants to support strengthening government authority, they were simultaneously more likely to support political protest, even violent rebellion, and more likely to support freedom of the press.¹¹⁹ While more likely than Protestants to support temporary detention of criminal sus-

114. TRACY, *supra* note 100, at 413.

115. GREELEY, *supra* note 11, at 55. The data on the image of God is reported in Andrew M. Greeley, *Evidence That a Maternal Image of God Correlates with Liberal Politics*, 72 SOC. & SOC. RES. 150 (1988).

116. Greeley, 72 *supra* note 115, at 150.

117. *Id.* tbl. 2.

118. Andrew M. Greeley, *Protestant and Catholic: Is the Analogical Imagination Extinct?*, 54 AM. SOC. REV. 485, 488-94 (1989). All of the findings cited in notes 114-21 are summarized and further discussed in GREELEY, *supra* note 11, at 34-64.

119. Greeley, *supra* note 118, at 494-97. Greeley notes: "Perhaps the reason is that the Catholic imagination inclines people to expect the government to be good, modestly and imperfectly good perhaps, but still good. When the flaws in government become intolerable, those who believe government can be a posi-

pects, Catholics were more likely to oppose capital punishment. In addition, Catholics ranked below Protestants on an overall measure of support for obedience to positive laws.¹²⁰ Thus, on social attitudes, Catholics seemed more tolerant of ambiguity, more equalitarian and inclusive, and less committed to a positivistic view of law than Protestants.

The same distinction holds when measuring attitudes less obviously linked to public issues. Catholics surveyed displayed less moral rigidity than Protestants, less of a tendency to invoke either the Bible or a church leader when determining life decisions, and more of a tendency to doubt their own faith and to express anger with God.¹²¹ Significantly fewer Catholics than Protestants stated that on the job they would obey orders from their boss, even if they did not understand them.¹²² Thus, as with social values, the individual moral decisions of Catholics displayed less reliance on a single source of "positive law" and more comfort with ambiguity.

It should be emphasized that the primary focus here is not upon placing Catholics and Protestants somewhere along a "liberal-conservative" continuum, as those terms are commonly used in American politics and law. While the tolerance and equalitarianism central to the analogical imagination correlate with a wide range of "liberal" positions on social issues, they also lead Catholics to be less tolerant than Protestants of behavior which threatens the family.¹²³ A basically communitarian outlook will look askance at behavior which threatens the most treasured of all communities. Thus, the issue is not whether "liberal" or "conservative" outcomes are reached, but how they are reached. Are these outcomes, as both types might be, the product of a positivist, literalist approach with little tolerance for ambiguity, or are they the result of a less rigid view, one much less concerned with putting all doubts to rest and more tolerant of ambiguity, and

tive good are more likely to take to the streets than those who take it for granted that government power is always evil." *Id.* at 497.

120. *Id.* at 496-97.

121. *Id.* at 498-99.

122. *Id.* at 500.

123. *Id.* As Greeley has stated: "[It is] useless . . . to try to pin the labels 'liberal' or 'conservative' on either denominational heritage. On issues of sexual morality and family life, Catholics are clearly more 'conservative'. . . . But on issues of social justice and neighborhood community, they are just as clearly more 'liberal.'" GREELEY, *supra* note 11, at 97. But, at least in the United States, opposition to premarital sex (sex which does not threaten the family unit?) is now higher among Protestants than Catholics. *Id.*

even inconsistency, in search of the ultimate values of fairness and community?

It should also be emphasized that, as almost always in social science, the data here speaks in terms of more or less, not in terms of yes or no. There are many Protestants whose views are consistent with the analogical imagination, many Catholics whose views are more dialectical. To say that more Catholics than Protestants favor or oppose a certain position is not to say that a majority of one religion stands in opposition to a majority of another. It merely means that the level of support in one group is noticeably different from that in another. Thus, sweeping generalizations are improper. Still, some useful conclusions might be drawn from this research.

IV. WHAT DOES THIS MEAN? WHY SHOULD WE CARE?

What can be learned from all of this? First, the narrow question: Can we view Justice Scalia's analytical style as typically Catholic, a style that might be expected as a natural consequence of a Catholic upbringing and education? While Professor Kannar makes a convincing case that Justice Scalia's religious views, as well as other aspects of his early life (such as the fact that his father was a professor of Romance languages) can be seen to have shaped his style of thinking,¹²⁴ does that mean that the religious education he received was uniquely likely to produce such a thinker?

Social science, it has been frequently noted, is far better at disproving things than it is at proving them. Even in that endeavor, care must be taken to explain what is or is not supported by the data. Thus, if the phrase "typically Catholic" means that most Catholics act or think in a certain way, it may be true that literalism and legalism—the dialectical imagination—is typically Catholic. But that does not seem to be the claim. Rather, the claim is that Justice Scalia's style of thought is typically Catholic in that it is more prevalent among Catholics than others. The available data simply does not support, indeed it refutes, the notion that Catholics are more rigorist in their analysis of moral, social and political issues than Protestants.

In short, the catechism is, on the whole, less important than the imagination. For one whose basic way of imagining the world is dialectical, language is likely to be treated in the same manner,

124. Kannar, *supra* note 14, at 1316-17.

and, to be sure, many of these people are Catholics. But when family, school and local parish¹²⁵ have instilled the analogical imagination, the language of the catechism will not destroy it. Comedian George Carlin, in a routine about attending Catholic schools, talks about the nun who taught his religion class. She lectured them, from the catechism, on the obligation to receive Communion at least once during the Easter season, which ends on Ascension Thursday, forty days after Easter. A hand goes up, and a student frames an elaborate hypothetical about a Catholic on a cruise ship who misses the deadline. But then the ship crosses the international dateline, and it is now Ascension Thursday again.¹²⁶ On one level, this story is simply one of a wiseacre. On another level, it is an example of the analogical imagination, pointing out ambiguity, surprise and the ultimate inability of rigid formulas to completely account for the richness of life.

Does Justice Murphy's analogical imagination make him the "typical" Catholic jurist? Not if one insists on evidence that most Catholics, or most Catholic judges or lawyers, would share his analytical style. But in the more modest sense that the analogical imagination is generally more likely to be found among Catholics than Protestants, Justice Murphy is the more typical Catholic jurist than is Justice Scalia. The analogical imagination is not merely a characteristic of "high church" theology.¹²⁷

At least two objections might be made to these conclusions. First, Greeley's data was drawn from a sample of Catholics in all walks of life. It might be argued that the legal profession is likely to draw disproportionate numbers of those Catholics most committed to dialectical thinking. In light of data establishing that individuals attracted to law school are more rule-oriented and authoritarian than the average American, this contention is not only possible, but quite likely. Still, there is no reason to believe that this is true only, or disproportionately, among Catholics.¹²⁸ Once

125. Thus, Greeley finds that the declining regard for the official hierarchy of the church does not result in a weaker religious identity, because the primary ways in which religion is transmitted are through family (both parents and spouse) and the local parish. See GREELEY, *supra* note 11, at 90-105 (Catholic family network), 144-81 (importance of local parish and school), 182-98 (interaction between relationship with spouse and relationship with God).

126. GEORGE CARLIN, *CLASS CLOWN* (Atlantic Records Corp. 1972).

127. See Kannar, *supra* note 14, at 1313. For a discussion of Kannar's distinction between "high church" theology and the understanding of average Catholics, see *supra* notes 96-99 and accompanying text.

128. See ALFRED G. SMITH, *COGNITIVE STYLES IN LAW SCHOOLS* (1979) (collecting data from sampling at 22 American law schools). Of course, law students differ widely among themselves on these scales. Smith did find noticeable differ-

again, the point is not that most Catholic lawyers and judges can be expected to reject rigid dialectical thinking, but rather that such thinking is less likely to be present (or at the very least, no more likely to be present) among Catholic than Protestant jurists.

Second, it might be said that the data merely shows that Justice Scalia is not typical of a generation of younger, post-Vatican II Catholics. Indeed, Kannar's claim is limited to the effect of Catholic education on Justice Scalia's contemporaries.¹²⁹ This objection is somewhat valid; Greeley's data does show that younger Catholics are more likely than older Catholics to possess a warmer, "mother and friend" image of God.¹³⁰ But this distinction between older and younger Catholics does not show that older Catholics are more rigid than older Protestants. Indeed, the older Catholic image of God is equally likely to be that of "mother and friend" than is the corresponding Protestant image.¹³¹

In surveys conducted fifteen to twenty years ago, which would have been composed heavily of adults educated before the more liberal attitudes of Vatican II, Greeley found that quite consistently, Catholics ranked no higher than, and often lower than, Protestants on measures of authoritarianism; but no lower, and often higher than, Protestants on measures of moral liberalism and trust.¹³² The only type of behavior in which a pattern does appear of older Catholics acting more rigidly than Protestants, with younger Catholics moving rapidly toward the more liberal attitudes of Protestants, is the degree of importance attached to parental obedience by children.¹³³ This finding is intriguing. One would expect childrearing practices to lead to similar attitudes toward social problems; but across a wide range of social attitudes, data at the very least refutes the notion that older

ences among the schools. *Id.* at 90-105. It is worth mentioning that Catholic law schools did not consistently appear above the mean on measures of student authoritarianism or intolerance of ambiguity. *Id.* at 93 & 97. Of course, a law school's Catholic affiliation does not indicate that all of its students are Catholic.

129. Kannar, *supra* note 14, at 1313-19.

130. Greeley, *supra* note 115, at 152 tbl. 2.

131. *Id.* For those over age 40, 19% of Catholics and 18% of Protestants held images of God as "mother and friend." *Id.* Thus, the trend does not start from a point where Catholics have a distinctly more traditional view and evolve to where they are indistinguishable from Protestants. Rather, the trend starts from a point of no difference to a point where Catholics have a significantly warmer view of God.

132. GREELEY, *supra* note 20, at 199-202.

133. See Duane F. Alwin, *Religion and Parental Child-Rearing Orientations: Evidence of a Catholic-Protestant Convergence*, 92 AM. J. SOC. 412 (1986).

Catholics were distinctly more likely than Protestants to display the rigorism of the dialectical imagination.

Does any of this really matter? Is it significant whether Justice Scalia, or Justice Murphy or neither can be seen as the typically Catholic jurist? Or is there something unseemly about the whole enterprise of trying to correlate religious views with judicial style, in light of the constitutional demand for government neutrality on religious matters?¹³⁴ Wise or unwise, religion and other aspects of judges' backgrounds inevitably serve as bases for prediction, not only of judges' behavior, but of the likely behavior of others. If (as seems likely in light of the discussion of religion during the Justice Thomas nomination process) religious background will continue to be used as a predictor of judicial style, an accurate depiction of background is certainly better than one based on demonstrably incorrect stereotypes.¹³⁵

It does seem to be true that the religious affiliation of lawmakers has an effect on how they discharge their duties. In surveying members of Congress, Peter Bensen and Dorothy Williams found correlations between religious views and policy positions, but found that the correlations were primarily not along denominational lines. Rather the correlations were based on whether the members of Congress saw religion as legalistic, "people-concerned," "self-concerned" or as something else.¹³⁶ Surely, this result is unsurprising; what would be shocking would be a finding that one's conduct is unaffected by one's conception of ultimate values.

Thus, the notion that religious values should have no impact on judicial thinking is wildly unrealistic. It is also self-contradicting; the radical separation of positive law and transcendent value itself reflects a particular view of religion.¹³⁷ Surely, there

134. The U.S. Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3. For a general discussion of this often forgotten constitutional provision, see Gerard V. Bradley, *No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

135. For a discussion of the role religion played in the nomination of Justice Clarence Thomas, see *supra* notes 1-3 and accompanying text.

136. PETER L. BENSON & DOROTHY L. WILLIAMS, *RELIGION ON CAPITOL HILL: MYTHS AND REALITIES* 107-67 (1982). For a discussion of religious values and voting on specific issues, see *id.* at 154-63. For a discussion of the difference between denominational affiliation, a weak indicator of behavior, and "religious type," a much better indicator, see *id.* at 137-39.

137. One of the religious types found by Benson and Williams in members of Congress was the "self-concerned religionist," "a religious faith that is de-

are limits. As a maker and interpreter of law in a religiously pluralist community, a judge must always strive to speak in terms of values and norms that are understandable to those with sharply differing conceptions of ultimate values.¹³⁸ But the universally accepted duty to justify decisions on something other than the will of God does not eliminate the fact that religious conceptions will have some impact on how one approaches legal and social problems.

A number of observers of American religion have concluded that religion is an important factor in one's world view. Differences within denominations, between "liberals" and "conservatives," between "analogical" or "dialectical" thinkers, however, are now far more significant than differences between denominations themselves.¹³⁹ Thus, when evaluating "how," not "whether," religious values are likely to manifest themselves in the work of a judge or lawmaker, it is highly advisable that we put aside easy denomination-based assumptions. Perhaps it is unimportant to defend the position that Justice Murphy's analytical style was in any sense typically Catholic, but there is considerable value in refuting the same claim about Justice Scalia. At the very least, it requires analysis beyond denominational labels in looking at the links between conceptions of religion and conceptions of law.

There is at least one additional perspective which gives this discussion value. As mentioned above, it is at least somewhat intriguing that Justice Murphy has not been highly regarded as a jurist despite having so many of his views subsequently accepted.¹⁴⁰ Might this be at least partly due to a failure to under-

voted, visible, articulate, enthusiastically shared, regularly practiced," but "almost entirely concerned with the relationship between the believer and God" with "relatively little impetus toward concern for fellow creatures." *Id.* at 128.

138. See generally KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 239-41 (1988) (arguing that judges "should be extremely wary of relying on religious convictions," but noting that at times judgments based on individual religious convictions will be unavoidable).

139. In addition to Benson and Williams, see J. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* (1988). For a discussion of the intra-denominational differences that seems particularly interesting in light of the debate over the Justice Thomas nomination, see Michael R. Welch & David C. Leege, *Dual Reference Groups and Political Orientations: An Examination of Evangelically Oriented Catholics*, 35 AM. J. POL. SCI. 28 (1991).

140. For a discussion of Justice Murphy's reputation as a jurist, see *supra* notes 79-82 and accompanying text. A 1970 poll of professors of law, history and political science rated Murphy an "average" Supreme Court Justice while his contemporaries Stone, Black, Frankfurter, Douglas, Jackson and Rutledge

stand, or accept as legitimate, the analogical imagination's approach to social problems? If those who choose law as a profession are generally more likely to think dialectically, and if that effect is reinforced by the historic fact that American legal culture has been predominantly Protestant,¹⁴¹ is it really surprising that a jurist who works from a very different world view will not be seen as merely expressing an alternative, yet legitimate, conception of law, but rather as doing law badly, or worse, dishonestly?

Much has been written recently about law as narrative; that is, the ways in which law tells a story of the lawmaker's view of the world, and at the same time how the stories about the world that the lawmaker brings to his or her work shape the law.¹⁴² It can be argued that different conclusions on legal issues are not merely the result of flawed reasoning or insufficient evidence, but rather are the inevitable result of judges starting with different assumptions about the way things are. Thus, these different assumptions lead them to emphasize or focus on different parts of reality.

The dominant "story" in American law would seem to be based upon the dialectical imagination. It is hardly surprising that a jurist who gives voice to that imagination, Justice Scalia, would find his work held in high regard. Perhaps it is time, though, to accept the legitimacy of a jurisprudential style based upon the analogical imagination. This idea, of course, is not one calling for a judiciary made up only of Justice Murphys. Tracy points out that in theology, the dialectical voice is necessary to challenge the analogical, as much as the analogical is necessary to

were all rated as "great" or "near great." HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS app. A at 412-13 (3d ed. 1992).

141. See Levinson, *supra* note 4. Levinson stated:

For Jews and Catholics alike, then, it seems plausible to argue that there is a price attached to entry into leadership positions within the polity. This price has been the modulation, if not outright suppression, of much awareness of anything within their respective religious traditions that might be significantly different from—let alone pose a challenge to—the wider American (and Protestant?) culture.

Id. at 1058.

142. There has been much discussion recently of the role of "narrative" in law and legal education. See, e.g., Richard Delgado & Jean Stefancic, *Norms and Narrative: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991) (discussing the effect of contemporary literature on judicial decisionmaking); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL ED. 1 (1990) (symposium "celebrates storytelling and narrative in legal education"); *Symposium: Law and Literature*, 39 MERCER L. REV. 739 (1988) (exploring connection between law and literature). This concept is being discussed in other disciplines as well. See Thomas Shaffer, Book Review, 33 AM. J. JURIS. 241 (1988) (reviewing JOHN C. HOFFMAN, LAW, FREEDOM, AND STORY: THE ROLE OF NARRATIVE IN THERAPY, SOCIETY, AND FAITH (1986)).

leaven the dialectical.¹⁴³ Should not it be clear that the same is true in law?

There may well be factors other than religion that increase the likelihood that a judge will bring to the bench a less dialectical imagination. As it becomes more common to see the Supreme Court dividing into intellectual camps around Justices Scalia and O'Connor,¹⁴⁴ the question of the impact of gender on analytical style is likely to become more prominent.¹⁴⁵ But to the extent that religion correlates with the kind of imagination one brings to the bench, there is no reason to consider Justice Scalia as a typical representative of Catholic analytical style. An examination not merely of "high church" thinking, but of the way Catholics actually do think, shows that Justice Murphy is at least as worthy, perhaps more so, of that distinction.

143. TRACY, *supra* note 100, at 409-10.

144. For a discussion concerning how this philosophical rift became prominent in the closing weeks of the 1991-1992 term, see *supra* notes 26-27.

145. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (discussing "feminine jurisprudence"). Martha Nussbaum suggests that sexual orientation, as well as gender, may be associated with different styles of thought. Martha Nussbaum, *The Softness of Reason*, THE NEW REPUBLIC, July 13 & 20, 1992, at 26.

